Nos. 10956 and 10984

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

ON PETITIONS FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ALVIN J. ROCKWELL,
General Counsel,
MALCOLM F. HALLIDAY,
Associate General Counsel,
OWSLEY VOSE,
THOMAS C. MARSHALL,
Attorneys,
National Labor Relations Board.

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JURISDICTION

These cases are before the court on petitions of the National Labor Relations Board for the enforcement of two orders issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*).[1] This

[1] The first of two orders was issued in the proceeding known as *In the Matter of Kinner Motors, Inc.* and *International Association of Machinists, District Lodge No. 94, for and on behalf of Lodge No. 311, A. F. L.*, Case No. 21–C–2307. The Board has

Court has jurisdiction under Section 10 (e) of the Act,[2] the unfair labor practices having occurred at Glendale, California, within this judicial circuit.

STATEMENT OF THE CASE

Upon proceedings had pursuant to Section 10 of the Act, the Board, on July 22, 1944, issued its decision in Case No. 21–C–2307 containing its findings of fact, conclusions of law and order (57 N. L. R. B. 622),[3] and on December 13, 1944, issued its decision

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requested enforcement of this order in No. 10956 in this Court. The second of the two orders was issued by the Board in the proceeding known as *In the Matter of Kinner Motors, Inc.* and *International Association of Machinists, A. F. L.*, Case No. 21–C–2389. The Board has requested enforcement of its order in this second proceeding in Case No. 10984 in this Court. References to the transcript of record in the first proceeding (No. 10956 in this Court) are made by the symbol "I"; references to the transcript of record in the second proceeding (No. 10984 in this Court) are made by the symbol "II." For convenience we are referring to the charging union herein, the International Association of Machinists, A. F. L., as the Union.

[2] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 32–35.

[3] Respondent's contention (I. 74) that the proviso to the Board's appropriation for the fiscal year ending June 30, 1944 deprived the Board of jurisdiction to proceed with Case No. 21–C–2307 is wholly without merit, as the Board found (I, 14, n. 1). The proviso prohibited the Board's expenditure of any funds appropriated to it for that fiscal year, in connection with complaint cases where an agreement between management and labor had been "in existence for three months or longer without complaint being filed" (see Appendix, p. 35, *infra*). Since this limitation upon the Board's spending power expired on June 30, 1944, respondent cannot, of course, possibly rely upon it now, as precluding the Board from using its current funds in connection with

in Case No. 21–C–2389 containing its findings of fact, conclusions of law and order (59 N. L. R. B. No. 175).[4]

THE BOARD'S FINDINGS OF FACT

1. *The business of the respondent.*—Respondent, a California corporation, owns and operates two plants at Glendale, California, where it is engaged in the manufacture of aircraft engine parts and the assembly of aircraft engines. During 1943, respondent purchased raw materials valued at more than $7,000,000, of which materials valued at more than $3,000,000 were transported to respondent's plants from points outside California. During the same period respondent sold and distributed finished products valued at more than $3,000,000, of which amount finished products valued at more than $500,000 were made for delivery and were delivered, by respondent to points and persons outside the State of California (I. 25, II. 21–22).[5]

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the case. The proviso to the Board's appropriation for the current fiscal year clearly has no application to the case at bar for it specifically excludes unions formed in violation of Section 8 (2) of the Act from its operation (see Appendix, pp. 34–35, *infra*). In any event, the propriety of the Board's expenditure of its appropriation is a matter between the Board, Congress, and the Comptroller General with which this Court will not concern itself in this proceeding. *N. L. R. B.* v. *Baltimore Transit Co.*, 140 F. (2d) 51, 58 (C. C. A. 4); *N. L. R. B.* v. *National Tool Co.*, 139 F. (2d) 490 (C. C. A. 6); *N. L. R. B.* v. *Thompson Products, Inc.*, 141 F. (2d) 794 (C. C. A. 9.); *N. L R B.* v. *Cowell Portland Cement Co.* (without opinion), decided September 9, 1943 (C. C. A. 9).

[4] In both decisions the Board adopted the findings, conclusions, and recommendations of the Trial Examiner, with certain additions (I. 14, II. 14).

[5] Respondent stipulated at the hearing that it is engaged in interstate commerce within the meaning of the Act (I. 12–13).

2. *The unfair labor practices.*—In Case No. 21–C–2307 the Board found that respondent had dominated and interfered with the formation and administration of Kinner Motor Employees Association, Inc. (herein called the Association) and had contributed financial and other support to it, thereby violating Section 8 (1) and (2) of the Act (I. 14–18, 26–34). In Case No. 21–C–2389 the Board found that respondent had discharged Richard Arthur Swope, James Macon Davis, and Lewis Gilpin because of their union membership and activities, and, in the case of Davis, for the further reason that he had testified at the Board hearing in the prior case, thereby violating Section 8 (3), (4), and (1) of the Act (II. 22–44).

THE BOARD'S ORDERS

In addition to the usual provisions requiring respondent to cease and desist from the unfair labor practices found, to post appropriate notices, and to furnish requisite compliance reports (I. 19, 20, II. 16–17, 18), the Board, in Case No. 21–C–2307, ordered respondent to cease and desist from giving effect to its contract with the Association and to withdraw all recognition from and completely disestablish the organization as the bargaining representative of its employees (I. 19, 20), and in Case No. 21–C–2389, directed respondent to reinstate Swope, Gilpin, and Davis with back pay (II. 17–18).

SUMMARY OF ARGUMENT

I. The Board's findings of fact with respect to the unfair labor practices are supported by substantial evidence. On the facts found, respondent has engaged in

and is engaging in unfair labor practices within the meaning of Section 8 (1), (2), (3), and (4) of the Act.

II. The Board's orders are valid and proper.

ARGUMENT

Point I

The Board's findings of fact are supported by substantial evidence. Upon the facts found respondent has engaged in and is engaging in unfair labor practices in violation of Section 8 (1), (2), (3), and (4) of the Act

A. Respondent's interference with and domination and support of the Association

1. The facts

The Union began its attempts to organize respondent's employees during the early part of March 1943 (I. 104–105). Shortly after the institution of these organizational efforts, Roy C. Walker, assistant to Brian C. Johnson, night foreman in Plant No. 1,[6] obtained permission from Johnson to talk to the men on the night shift concerning the formation of an independent organization. In his talk to the men Walker referred to the fact that "the A. F. of L. was handbilling us at the gate," and stated that "we were going to have some sort of an organization pretty soon" and that he "thought it would be a good idea if we had one of our own" (I. 223, I. Tr.[7] 334). Foreman Johnson was present during Walker's talk (I. Tr. 335).

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[6] Walker was in charge of the night shift on Foreman Johnson's night off each week (I. 218–221, 260).

[7] This reference is to the original typewritten transcript of testimony before the Board heretofore filed in this Court.

Shortly thereafter Leadman John Williams conferred with Leadmen Howard Sharrar[8] and Orville Gilbert concerning the formation of an independent union, and following a conference with an attorney, these three leadmen, on March 22, 1943, signed articles of incorporation for the Association (I. 102, 105–106).[9]

Thereafter Williams and his two associates had cards printed bearing the following text (I. 167):

> I, the undersigned, hereby designate and appoint Kinner Motors Employees' Association, Inc., as my exclusive bargaining agent under and by virtue of the terms of the National Labor Relations Act.

These cards were given by Williams to other leadmen, who distributed them among the employees and obtained employees' signatures thereon in the plant during working hours (I. 107, 194–195, 207–208, 211, 232–233, 224). Foreman Johnson and Supervisor Kroening[10] also handed out these cards to employees and solicited employees' signatures (I. 182, 256).

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[8] Sharrar was subsequently promoted to be night superintendent of Plant No. 2, (I. 130, 145).

[9] We discuss respondent's contention that it is not answerable for the activities of its leadmen at pp. 12–13, *infra*.

[10] Kroening was in charge of the testing of motors and had from 3 to 9 employees under him doing test work. He instructed new employees in this work, checked the engines being tested by the employees under him, recommended them for wage increases, and generally oversaw testing work (I. 248–250). The Board very properly found (I. 14, 28–29, 33–34) that Kroening's position and duties were such that employees reasonably considered his Association activities as having the approval and support of management and that respondent was therefore accountable for them. See pp. 13–14, *infra*.

The first general meeting of the Association was held April 16, 1943. At the request of Leadmen Williams and Sharrar, R. L. Stevens, respondent's receiving clerk, acted as temporary chairman (I. 149, 151). At the second meeting, on April 23, Stevens was elected president of the Association (I. 157). He continued in office until the following December, despite the fact that about a week after his election he was promoted and placed in charge of the Receiving Department (I. 145–146, 157). Christine Jagoe, Secretary to Personnel Manager Sullivan, acted as secretary at the first Association meeting (I. 167–168). Thereafter, Rose Minor, also employed in the personnel office and in charge of employee insurance and personnel records, became secretary of the organization (I. 168). Despite the adoption of bylaws which rendered her ineligible to continue in office, she remained as secretary (Int. Exh. 1, I. 168–169).

In May, respondent entered into negotiations with the Association which culminated on June 16, 1943, in a contract recognizing the Association as the exclusive bargaining agent of its employees with certain exceptions, and covering working conditions generally, but not dealing with the vital subject of wages (Bd. Exh. 6). Thereafter copies of the contract were printed at respondent's expense and distributed to all employees whether members or not (I. 170–171). Bound within the covers of the contract were two detachable cards, one an application for membership in the Association and the other authorizing the re-

spondent to make certain deductions monthly and to pay the deductions to the Association (Bd. Exh. 6).

Copies of the Association contract including the above-mentioned enclosures were handed to new employees together with other material incidental to their employment, such as group insurance literature, by Association Secretary Jagoe, as part of her duties in respondent's personnel office (I. 170–171).[11] The effectiveness of this device as a "membership-getter" is attested by the testimony of Association President Stevens that the organization continued to receive signed-up membership applications, apparently without any solicitation on the part of the Association (I. 163).

In July, in an obvious effort to enhance the prestige of the Association, respondent permitted the organization to take credit for obtaining a wage bonus, which respondent unilaterally conferred upon the night shift workers. Thus, early in July respondent allowed the following notice to be placed on the plant bulletin boards (I. 161):

> NOTICE TO NIGHT SHIFT EMPLOYEES
>
> Please be advised that commencing immediately a bonus for night shift employees of five cents an hour will be paid by Kinner Motor Company, Inc., in accordance with the terms of the contract recently executed by and between

[11] It is significant that while Jagoe informed new employees that participation in the group insurance plan was purely voluntary, no such assurance was given with respect to the joining of the Association (*ibid.*).

Kinner Motor Company, Inc., and Kinner Motor Employees Association, Inc.

Please be further advised that this bonus has been approved by the War Labor Board.

KINNER MOTOR EMPLOYEES ASSOCIATION, INC.

By ROBT. L. STEVENS, *President.*

Although the contract did not obligate respondent to pay the wage bonus, respondent took no steps to repudiate this false claim, but on the contrary, as we have seen, permitted it to be given publicity on bulletin boards in the plant. In sharp contrast is respondent's conduct shortly thereafter when a rumor became prevalent that an affiliated union had been instrumental in obtaining higher wages for respondent's plant guards. On this occasion respondent promptly posted a notice for the express purpose of "correcting mistatements that are being made in the plant with reference to present wage raises" in which it flatly declared that "No Organization Had Anything To Do With Granting Of The Present Increases" (I. 161–162).

Respondent thereafter continued to lend weighty support to the Association. During the summer respondent permitted the employees on the night shift to elect a steward on the plant premises during working hours and in the presence of Foreman Johnson (I. 212–215, I. Tr. 453). Leadman Cadaret, who was elected steward at this election, thereafter attended Association meetings on company time without "punching out" his time card (I. 215–216). In No-

vember, Personnel Director Sullivan, in the course of a speech to the night shift employees, advised them that the Association had been organized for them and that he thought that it was best for them to join (I. 188–189).

2. The illegality of respondents conduct under Section 8 (2) and (1) of the Act

Upon the foregoing facts the Board very properly found (I. 14, 34) that the respondent had "dominated and interfered with the formation and administration of the Association and has contributed financial and other support to it, in violation of Sections 8 (1) and (2) of the Act." As we have seen (*supra,* p. 5), shortly after the employees had commenced to organize through the Union, the formation of an independent organization was advocated by an assistant foreman in a speech to the night shift employees which was made in the plant, with the consent of the foreman in charge.[12] Respondent's leadmen thereafter openly espoused the formation of the Association, urging employees to join in the plant during working hours, and in this they were assisted by certain of respondent's foremen and other supervisory employees (*supra,* pp.

[12] The fact that the formation of an independent union was not thought of until a nationally-affiliated union appeared on the scene strongly suggests that the proponents of the organization were more interested in forestalling a nationally-affiliated organization than in fashioning for themselves an effective instrument for collective bargaining. This and other courts have been quick to recognize the significance of this factor. *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 336; *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 593 (C. C. A. 9); *N. L. R. B.* v. *Tovrea Packing Co.*, 111 F. 2d 626, 629 (C. C. A. 9).

6–10). The foregoing facts alone amply support the Board's finding that respondent has unlawfully interfered with and dominated the Association, as this and other courts have held. *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 590, 591–592; *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518–519; *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 593–594 (C. C. A. 9); *N. L. R. B.* v. *Germain Seed and Plant Co.*, 134 F. 2d 94, 96–99 (C. C. A. 9); *N. L. R. B.* v. *Idaho Refining Co.*, 143 F. 2d 246, 248 (C. C. A. 9); *N. L. R. B.* v. *Gilfillan Bros., Inc.*, decided April 21, 1945 (C. C. A. 9).[13]

In addition to dominating and interfering with the Association, as above described, respondent openly assisted the organization in various ways. Thus re-

[13] The Board's conclusion that respondent has interfered with and dominated the Association finds further confirmation in the fact that the organization was largely left in the hands of persons having supervisory status or who were closely allied to the management. The first president of the Association, as we have noted (*supra*, p. 7), continued to serve many months after he was named head of the Receiving Department and the secretary of the organization remained in office notwithstanding the fact that she served in a confidential capacity to Personnel Director Sullivan and was ineligible to membership under the constitution and by-laws of the Association; at least two members of the Board of Directors of the Association were leadmen. Since the placing of persons closely allied with the management in positions of responsibility in a union creates a formidable obstacle to genuine freedom of action on the part of the union and raises a serious question as to its independence, the Board properly gave weight to this factor in appraising the Association and respondent's relations with it. Cf. *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 593 (C. C. A. 9); *N. L. R. B.* v. *Germain Seed and Plant Co.*, 134 F. 2d 94, 96–99 (C. C. A. 9); *N. L. R. B.* v. *Idaho Refining Co.*, 143 F. 2d 246, 248 (C. C. A. 9).

spondent greatly aided the Association's efforts to sign up new members by distributing among all new employees copies of the contract containing detachable membership applications and dues check-off authorizations (*supra,* p. 8). Respondent's disparate treatment of the claims of the two labor organizations in connection with the night shift bonus and the wage increase for the plant guards (*supra,* pp. 8–9), plainly "enhanced the prestige and efficacy of the Association as a bargaining representative and thereby assisted it in maintaining and increasing its membership," as the Board found (I, 17–18). Respondent further assisted the Association by permitting the employees on the night shift to elect a steward in the plant during working hours and by allowing Leadman Cadaret to leave his work without loss of pay to attend Association meetings (*supra,* p. 9). There is thus an ample basis for the Board's finding (I. 17, 18) that respondent, in violation of Section 8 (2) and (1) of the Act, rendered "powerful support" to the Association and "assisted it in maintaining and increasing its membership." See cases cited at p. 11, *supra.*

The Board properly rejected respondent's contention that it was not answerable under the Act for the activities of its leadmen. While the Board, because of the abundant evidence that the efforts of the leadmen on behalf of the Association had respondent's full support and assistance, found it unnecessary to determine the full extent of their supervisory powers the record, as the Trial Examiner noted in his intermediate report (I. 33, n. 12), contains persuasive evidence that leadmen possessed such powers. Thus it

appears that the leadmen were in charge of various groups of men, distributed work to the men in their groups, and gave them instructions as to the time, place, and manner of performance of their duties (I. 99–101, 122–125, 131–134). At regular intervals they checked the quality of the work being turned out at the machine, checked blueprint tolerances and generally oversaw operations (I. 100, 124–125). If the men were desirous of wage increases, they often spoke to leadmen about them and occasionally leadmen made recommendations for higher remuneration (I. 127). Leadmen did not themselves hire or discharge employees, but they had power to and did recommend the discharge of employees working under them, and such recommendations were given serious weight (I. 123–125). Leadmen were paid an hourly wage rate appreciably in excess of that paid to men in their groups (I. 100, 122). From the foregoing and from respondent's support and approval of their activities in connection with the Association it is clear that the employees as a whole were justified in inferring, as they in fact did, that the leadmen spoke for and represented the management in their activities on behalf of the Association. Respondent therefore is liable for their conduct under the controlling decisions of the Supreme Court. *International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 79–80; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 599; *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 520–521; *N. L. R. B.* v. *Pacific Gas and Electric Company,* 118 F. 2d 780, 787 (C. C. A. 9).

The respondent is not exculpated from liability for the activities of its leadmen merely because they were eligible to join the Association and may also have been eligible to join the Union. The test of employer liability as the Court noted in the *Pacific Gas* case, *supra,* is whether the employees "would have just cause to believe" that the leadmen "were acting for and on behalf of the management" (118 F. 2d, at 787). Since in this case it is clear that the employees had ample reason to believe that the leadmen were acting for respondent, respondent is answerable for their conduct whether or not they were eligible for membership in either the Association or the Union. See *Pacific Gas and Electric* case, *supra,* 118 F. 2d, at 788; *N. L. R. B.* v. *Aintree Corp.,* 132 F. (2d) 469, 472 (C. C. A. 7), cert. denied, 318 U. S. 774; *N. L. R. B.* v. *Skinner and Kennedy Stationery Company,* 113 F. 2d 667, 671 (C. C. A. 8); *N. L. R. B.* v. *Christian Board of Publication,* 113 F. 2d 678, 682 (C. C. A. 8).

B. Respondent's discriminatory discharge of Swope, Davis, and Gilpin

Respondent terminated the employment of Richard Swope on February 17, 1944, and James Davis and Lewis Gilpin on February 23, 1944. While respondent contended before the Board that these men merely had been laid off for lack of work, the Board found (II. 35) that the men had in fact been discharged because of their union affiliation and activities, and in the case of Davis, for the further reason that he had testified in the prior Board hearing. Accordingly, the Board concluded (II. 46) that respondent's conduct in this regard violated Section 8 (1), (3), and

(4) of the Act. These findings and conclusions are fully supported by the evidence, as we shall demonstrate.

Richard Swope, an experienced mechanic, entered respondent's employ in June 1940, as a machine operator (II. 298–299). James Davis, an experienced machinist (II. 240–243), was hired by respondent in October 1941, and was first employed in the subassembly of aircraft engines (II. 237–238). Lewis Gilpin, a machinist of many years' experience, and with some 12 years' experience as a tool maker, was employed by respondent as a machinist in December 1942, at $1.25 an hour (II. 186–190).

All three men proved to be eminently satisfactory workers, as is evidenced by the many wage increases and reclassifications which each of them received. Thus, Swope, who started at 50 cents an hour, as a result of periodic increases and reclassifications, was a "tool maker, Class C," at 95 cents per hour, at the time of his discharge (II. 299). Davis, who first performed assembly work, was transferred to the machine shop where, after four wage increases, he was receiving $1.25 an hour as a "toolmaker, Class B," at the time of his discharge (II. 280). Gilpin, who started in as a machinist at $1.25 per hour, was progressively classified as a Class B machinist, and later as a Class A machinist, at $1.35 per hour, including a 5-cent bonus for night work (II. 189, 192).

The outstanding ability of these men is further seen in the comments of respondent's supervisory officials concerning their work. Edward Davey, works manager in charge of production at Plant 1, com-

mented on an occasion in December 1943, in which Davis asked for a wage increase or a certificate of availability, that Davis' work had been "very satisfactory," and that he had cited Davis to other employees as an example of the advancement that could be obtained through meritorious work (II. 272). Davey also remarked on this occasion: "Your friend Gilpin is the best man I have got in the toolroom * * * don't know what I would do without him" (*ibid.*). Earlier in 1943, Foreman Brian Johnson had observed, in the course of a conversation with Gilpin, Davis, and Swope, that Swope had broken a production record on a radial drill press operation (II. 311–313).[14]

The hearing before the Board upon the charges that respondent had unlawfully dominated, interfered with, and supported the Association was begun on December 13, 1943. Davis, one of the Board's principal witnesses, gave testimony adverse to respondent and, in particular, contrary to the testimony of Personnel Director Sullivan and Foreman Brian Johnson, witnesses for respondent (I. 181–189). Gilpin and Swope, close friends of Davis, attended the hearing and sat with Davis on occasion, thereby openly demonstrating their adherence to the Union and their opposition to the Association (II. 212–215, 261–264). Shortly after the hearing, the Union renewed its efforts to organize respondent's employees, and all three

[14] Swope had in fact turned out 20 rear covers during his 10-hour shift, while 7 was the maximum other employees had produced in the same period (II. 312).

men signed union cards and wore union buttons while at work (II. 215–216, 285–286). Davis actively aided the union in its organizational efforts by passing out union authorization cards, and was named a union steward for his shift (II. 253–255, 284–286). For the last 10 days of his employment he regularly wore a large union steward's button while at work (II. 286).

The espousal of the Union's cause on the part of Swope, Davis, and Gilpin did not rest well with respondent, particularly Foreman Johnson, who frankly remarked to Employee Handzel, upon being questioned about the outcome of the hearing, that "those damn fools over in the tool room[15] are just a bunch of troublemakers," and that "if they didn't care to belong to the Kinner Union * * * they didn't have to cause the trouble of bringing it up before the Labor Board" (II. 151–152). After the hearing, Ross Nichols, the foreman of the night shift in the tool room, on which all three men worked, openly displayed his resentment against Davis. While prior to the hearing, Nichols had been friendly to Davis, thereafter he ceased talking with Davis, except to the extent necessary to get the work out, and apparently went out of his way to find fault with Davis' work (II. 265–266). Davis encountered the same change in attitude on the part of Assistant Foreman Malamphey, Personnel Director Sullivan, and Works Manager Davey (II. 265–271).

Less than a month after the Trial Examiner in the prior proceeding issued his intermediate report on

[15] At the time Swope, Gilpin, and Davis were the only employees in the tool room on the night shift (II. 150).

January 25, 1944, finding respondent guilty of unfair labor practices in connection with the Association, respondent abruptly terminated the employment of all three men. When Swope reported for work on February 17, 1944, he was advised by Foreman Nichols that there was no further work for him (II. 303–304). On his return to the plant several days later, Swope was given his pay check and a termination slip which stated: "Laid off—Termination of Contract" (II. 303–306, Bd. Exh. 12). On February 23, when Gilpin and Davis reported for work at their usual hour, they found that their work cards were missing and were advised by a plant guard that they were wanted at the personnel office (II. 249). Personnel Director Sullivan told them that Nichols had reported to him that there was no work for them (II. 250). On the following day, they returned for their checks and received their termination notices which stated: "lay off; lack of work. No available work for this employee" (II. 203–206, 257–260, 306–308). No warning was given to any of these men that they were to be laid off (II. 208, 246, 304).

Respondent contended before the Board, as we have briefly indicated, *supra,* p. 14, that Swope, Davis, and Gilpin were laid off for lack of work resulting from the cancellation of contracts for substantial quantities of war materials. In support of its contention respondent adduced evidence indicating that contracts covering $1,500,000 worth of war materials to be produced at Plant 1 were cancelled on December 29, 1943, leaving a balance of $400,000 in contracts for that plant (II. 28–29). However, respondent's

personnel records clearly show that no other employees were laid off for lack of work at Plant 1 during the period between the cancellation of the contracts on December 29, 1943, and April 20, 1944 (II. 108–112). Not only was there no general reduction in respondent's labor force at Plant 1 following the cancellation of the contracts,[16] but during the period in question respondent's labor force at Plant 2, which is separated from Plant 1 only by a narrow alley, was steadily expanding (II. 108–112) and respondent was regularly seeking applicants for jobs which these employees were qualified to fill through advertisements inserted in various newspapers (II. 113–115, 120–121).

The machine and tool making operations at Plant 2 are of the same general character as at Plant 1 and the transfer of employees from one plant to the other is not uncommon (II. 85–87).[17] During the period from January 1, 1944 to April 20, 1944, respondent hired a total of 125 new employees for production or tool department jobs in Plant 2 at a wage rate of 85 cents an hour or more (II. 96–102).[18] At the same time these men were being dismissed, that is, from February 17 to 28, 1944, respondent hired 9 new em-

[16] While the total number of production employees at Plant 1 fluctuated between 201 on December 31, 1943 and 185 on February 29, 1944, this temporary reduction was due to "quits" rather than lay-offs due to lack of work as respondent's records clearly show (II. 108, 110). The total number of production employees at Plant 1 was 199 on April 30, 1944 (II. 112).

[17] Five of the total of 19 employees on the night-shift at Plant 1 as of August 1, 1943, were thereafter transferred to jobs in Plant 2 (II. 93).

[18] In addition, respondent rehired 7 former employees after a leave of absence (II. 96–102).

ployees in the toolmaker, milling machine operator, radial drill operator, grinder, and engine lathe operator classifications at rates of pay ranging from $.95 to $1.25 per hour, which was approximately the range of pay of the three discharged men (II. 99). All three of the discharged employees were qualified and experienced in these operations (II. 185–196, 238–244, 299–302). In addition to these employees, who were taken on at Plant 2, 5 new employees were hired at Plant 1 within 2 months after the 3 men in question were terminated (II. 101–102). Notwithstanding the availability of work which Swope, Davis, and Gilpin were qualified to perform, respondent neither made any effort at the time of the discharges to utilize their skills [19] in other operations (II. Tr. 537–538, 604–605) nor did it thereafter recall them as work subsequently opened up at Plant 1 on the operations they formerly had performed (II. 401–403).

From the foregoing it is clear that there is no substance to respondent's contention that Swope, Davis, and Gilpin were laid off for lack of work resulting from the cancellation of war contracts. The real reason for their discharge, we submit, is apparent. Davis was the mainstay of the Union in its efforts to organize respondent's employees and was one of the principal witnesses against respondent in the prior proceeding which resulted in a Board finding that respondent had

[19] It is noteworthy that on January 1, 1944, after the cancellation of a substantial part of the Plant 1 contracts, respondent requested an occupational draft deferment for Davis, citing as a basis therefor that he was engaged in a highly skilled operation and that he could be replaced only out of industry (II. 117–120).

unlawfully interfered with and dominated the Association. Swope and Gilpin had shown themselves to be closely allied with Davis in union matters and because of their close association the three men had been dubbed "the three musketeers" by their fellow employees (II. 282). Respondent's opposition to outside labor organizations is clearly seen not only in its efforts to erect the Association as a bulwark against such organizations, but also in the contrasting treatment of the claims of the rival labor organizations concerning benefits secured for the employees (*supra,* pp. 8–9). And, as we have shown, *supra,* p. 17, Foreman Johnson bluntly expressed his disapproval of the actions of Davis, Swope, and Gilpin in pressing charges concerning the Association before the Board, and other supervisory officials of respondent openly displayed their resentment against Davis for having testified against respondent at the hearing in the first proceeding before the Board (*supra,* p. 17). Under all the circumstances it is submitted that the Board was clearly warranted in concluding that respondent, in violation of Section 8 (1) and (3) of the Act, discharged Swope, Davis, and Gilpin because of their union affiliation and activities, and for the further reason, in the case of Davis, because he testified against respondent at the prior Board hearing, thereby violating Section 8 (4) of the Act. See *N. L. R. B.* v. *Walt Disney Productions,* 146 F. (2d) 44, 47 (C. C. A. 9), cert. denied April 23, 1945; *N. L. R. B.* v. *American Pearl Button Co.,* No. 12972 (C. C. A. 8), decided May 8, 1945, 16 L. R. R. 403, 404–405.

Point II

The Board's orders are valid and proper

The Board's orders direct respondent to cease and desist from dominating, interfering with, or contributing support to the Association, from giving effect to its contract with that organization (Case No. 21–C–2307, I. 19), and from discharging or otherwise discriminating against any of its employees because of his union membership or activities, or because he has given testimony under the Act (Case No. 21–C–2389, II. 16–17). In both cases respondent is ordered to cease and desist from in any other manner interfering with its employees in the exercise of their rights under the Act (I. 19, II. 17). The Board's orders affirmatively require respondent to withdraw recognition from and completely disestablish the Association as the collective bargaining representative of any of its employees (Case No. 21–C–2307, I. 20), and to reinstate Swope, Davis, and Gilpin with back pay (Case No. 21–C–2389, II. 17–18). The orders in both cases contain the usual posting of notices and furnishing of compliance report provisions (I. 20, II. 18).

A. The cease and desist provisions

The provisions of the orders requiring respondent to cease and desist from the unfair labor practices in which it is found to have engaged are mandatory under Section 10 (c) of the Act. *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 265.

The provisions directing respondent to cease and desist from in any other manner interfering with its

employees in the exercise of their rights under the Act are, it is submitted, fully within the broad discretion vested in the Board to determine how unfair labor practices are to be remedied. As the Supreme Court observed in *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, at 194: "But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review." See also *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82, *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 266; *N. L. R. B.* v. *Sunshine Mining Co.*, 125 F. (2d) 757, 761 (C. C. A. 9); *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 660–661 (C. C. A. 9).[20] Respondent, as we have seen (*supra*, p. 5), countered the first organizational efforts of its employees with the formation of a rival unaffiliated organization and thereafter aided it greatly in maintaining and increasing its membership.

[20] A broad cease and desist provision identical with the provisions here under discussion was enforced by the Circuit Court of Appeals for the Eighth Circuit in *N. L. R. B.* v. *May Department Stores Co.*, 146 F. 2d 66. The Supreme Court on April 9, 1945, granted the employer's petition for certiorari, which challenged, among other things, the broad cease and desist provision there involved (65 S. Ct. 1014), and consequently the question of the validity of this type of order is now before the Supreme Court.

Shortly after respondent's relations with the Association were found by a Trial Examiner of the Board to be violative of the Act, respondent abruptly discharged one of the principal witnesses against respondent at the hearing before the Board and two of his associates in the Union (*supra,* p. 14). Respondent's conduct in this regard, as the Board found (I. 18, 34, II. 35, 46), violated not only Section 8 (2), (3), and (4) of the Act, but Section 8 (1) of the Act as well. As the Circuit Court of Appeals for the Second Circuit has held, discharges because of union activity are "probably the primary wrong against which Section 8 (1) * * * was directed" (*N. L. R. B.* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 869, cert. denied 304 U. S. 576).[21] Having engaged in unfair labor practices within the meaning of Section 8 (1) of the Act, the issuance of an order requiring respondent to cease and desist from such unfair labor practices is also mandatory under Section 10 (c) of the Act.

The scope of the provisions requiring respondent to cease and desist from its unfair labor practices in violation of Section 8 (1), i. e., the inclusion therein

[21] See also the following cases in which this and other courts have held that violations of other subdivisions of Section 8 also constitute violations of Section 8 (1) : *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 432–433; *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22–23 (C. C. A. 9); *Art Metals Construction Co.* v. *N. L. R. B.*, 110 F. (2d) 148, 150–151 (C. C. A. 2); *N. L. R. B.* v. *Waumbec Mills*, 114 F. (2d) 226, 234 (C. C. A. 1); *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 265 (C. C. A. 3).

of the *in any other manner* clause, is warranted, it is submitted, under all the circumstances of this case. Respondent has sought to interfere with the self-organizational activities of its employees in diverse ways, and it is reasonable to anticipate that it will seek to combat future organizational efforts by other means. The broad cease and desist provision is therefore necessary to protect the employees from further invasions of their rights under the Act. This Court has recognized that "the methods by which a given unfair labor practice may be committed are so varied and numerous that the protection granted to employees by the Act would be largely ineffectual if each variation on the same theme necessitated a separate hearing and a specific prohibitory order," and that it is for this reason that the Act confers upon the Board the broad power to enjoin the unfair labor practice found and not merely the specific acts which constitute the unfair labor practice. *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 661 (C. C. A. 9).

The propriety of the broad cease and desist provision is indicated by the Supreme Court decision in *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426. In this case the Supreme Court affirmed the Board's power to restrain not merely the specific unlawful practice in which the employer has engaged, but also "other like or related unlawful acts" (312 U. S., at 436). The opinion points out that "the breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is

indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past" (312 U. S., at 436–437). Further clarifying its position, the Supreme Court pointed to various cases in which it had enforced broad cease and desist orders because "in them the unfair labor practices did not appear to be isolated acts in violation of the right of self-organization, like the refusal to bargain here, but the record disclosed *persistent attempts by varying methods* to interfere with the right of self-organization in circumstances from which the Board or the Court found or could have found the threat of continuing and varying efforts to attain the same end in the future" (312 U. S., at 437–438). [Italics supplied.] The broad noninterference provisions in these cases are clearly proper under the rule laid down in the *Express Publishing* case. Respondent, as we have shown, has engaged in "persistent attempts by varying methods to interfere with the right of self-organization," and it is reasonable to infer therefrom that there is a danger of respondent's committing other unfair labor practices in the future, which although similar and related to the unfair labor practices committed in the past, would not come within the ban of the other cease and desist provisions of the order. The broad non-interference provisions are therefore necessary to make the Board's orders in these cases coextensive with the threat of future unfair labor practices reasonably to be anticipated from respondent's past unlawful conduct.

We are not unmindful of the decisions of this Court *N. L. R. B.* v. *Walt Disney Productions,* 146 F. (2d) 44; *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. (2d) 237; *N. L. R. B.* v. *Cheney California Lumber Co.,* decided March 31, 1945; and *N. L. R. B.* v. *Gilfillan Bros., Inc.,* decided April 21, 1945, in which the Court struck the broad cease and desist provisions from the Board's orders upon the grounds that the specific cease and desist provisions were sufficiently broad to cover future unfair labor practices,[22] but, for the reasons hereinabove set forth, we respectfully submit that those decisions not only fail to give proper scope to the Board's discretion to determine remedy but also ignore the principle laid down in the *Express Publishing* case that the Board is entitled to enjoin like and related acts, as well as the specific unfair labor practice in which the employer has engaged and hence should not be followed here.

B. The affirmative provisions

The affirmative provisions of the Board's orders requiring respondent to disestablish the Association and to reinstate Swope, Davis, and Gilpin with back pay are the usual remedial orders entered upon findings of violations of Section 8 (2), (3), and (4) of the Act and their validity is not to open to question. *N. L. R. B.* v. *Falk Corp.,* 308 U. S. 453, 459–461; *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241, 249–251; *Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 187–189, 197.

[22] Compare *N. L. R. B.* v. *Holtville Ice Co.*, 148 F. (2d) 168, and *N. L. R. B.* v. *Whiting-Mead Co.*, 148 F. (2d) 817, in which this court enforced broad cease and desist provisions despite the employers' objections.

The Board properly rejected respondent's contention that the Board should withhold the normal remedy of reinstatement and back pay in the cases of Swope, Davis, and Gilpin because of derogatory statements concerning the purchase of war bonds made by these men. In support of its contention respondent adduced evidence to the effect that subsequent to the dismissal of these men respondent learned that they had previously commented adversely upon the purchase of war bonds in the course of conversations with their fellow workmen.[23] The men themselves denied having made the statements attributed to them but admitted having made certain comments which were clearly unfavorable to the purchase of war bonds.[24] The

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[23] The statements these men are alleged to have made are set forth in detail in the Intermediate Report (II. 36–38, n. 12).

[24] The testimony of these men concerning the statements in question, as summed up in the Intermediate Report which was adopted by the Board, is as follows (references to the record are inserted in brackets):

"Gilpin admitted that he had stated that it was not patriotic to buy war bonds at a profit. 'I would say that here or anywhere,' he testified, 'that I thought anybody that would buy war bonds for a profit while the boys are dying in France, wasn't very patriotic. I say give the money; they were giving their lives.' [II. 217.] He denied, however, that he stated that the bonds would be worthless. [II. 225.] Davis admitted that he told Dayhoff on one occasion that he did not believe in 'tying up all the money that a man had in War Bonds, because they might be frozen at any time and he wouldn't have the opportunity to get necessary money in case of sickness or so forth.' [II. 292.] He did not recall having said at any time that the bonds would be worthless. [*Ibid.*] 'I said,' he testified, 'that it was possible that the Government debt would get so big they couldn't pay off. I didn't say they would. I said it was possible.' He also admitted that he told Dayhoff that he did not know that the bonds would be good 'since the war bonds in the first war were not redeemed at full price and this was

Board found, upon the basis of the entire testimony, that Swope, Davis, and Gilpin had each made statements to fellow employees which would be understood by them as adverse to the purchase of war bonds but, however, concluded (II. 15), in view of the considerations discussed below, that the reinstatement of these men with back pay "would not adversely affect plant morale or production, and that effectuation of the purposes and policies of the Act requires their reinstatement with back pay."

The statements in question were made, as the Board noted (II. 40–41), in the course of casual discussions and arguments among the employees, and not as a part of a concerted effort on the part of Swope, Davis, and Gilpin to discourage the purchase of war bonds (II. 402). There is no evidence that their talk provided an actual impediment to the sale of war bonds or created disorder or commotion in the plant, or in any way interfered with respondent's production or discipline. Although Employee Holmes reported to Foreman Brian Johnson in the fall of 1943 that Davis and Gilpin had commented adversely on the purchase of war bonds, Johnson did not consider the matter serious enough to bring to the attention of the management (II. Tr. 760–761). Too, it is

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a much bigger debt at this time than it was before.' [II. 292–293, 407.] Swope testified that after reading a newspaper article in January 1944, on the amount of money spent by the U. S. Treasury in advertising the sale of war bonds, he remarked to Dayhoff that it might be more practical to spend the money on the purchase of war materials instead of advertising. [II. 314–315.] He did not recall ever having stated that the bonds would be worthless." [II. 316.]

noteworthy that throughout the period the statements were being made Swope, Davis, and Gilpin were actively cooperating in the purchase of war bonds through pay-roll deductions (II. 218, 316–317, 406–407).

Under all the circumstances of the case, it is submitted that the Board did not abuse its discretion in determining (II. 40–41) that "while * * * certain of the statements were ill-advised and improper, they did not represent a wilful and malicious obstruction of the war effort, and are not distinguishable in principle from such criticism of certain phases of the war effort as is heard in and out of industry, and which is privileged under our constitutional guarantee of free speech"[25] and hence did not warrant the Board in withholding the normal remedy of reinstatement with back pay in the case of Swope, Davis, and Gilpin.[26]

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[25] During the last war all of the Government bonds sold were of the negotiable type which could be converted into cash in advance of the maturity dates only by selling them on the open market. The market price of these bonds during substantial periods after the last war was considerably below their face value and consequently holders of the bonds who were forced to sell during such periods suffered substantial losses. In view of these losses it is not beyond comprehension that persons unfamiliar with the cash redemption provisions of the nonnegotiable bonds sold to the public during this war might express doubts as to the liquidity of investments in war bonds.

[26] It is to be noted that the Board in its decision pointed out (II. 15) that nothing therein contained "should be construed to preclude the respondent from resorting to nondiscriminatory disciplinary action appropriate to bar the resumption of such practice in the event that the three employees, or any of them, make any such derogatory statement with respect to United States war bonds in the future."

CONCLUSION

It is respectfully submitted that the Board's findings in both cases are supported by substantial evidence, that its orders are valid and proper, and that decrees should issue enforcing the Board's orders in full, as prayed in the Board's petitions for enforcement.

ALVIN J. ROCKWELL,
General Counsel,
MALCOLM F. HALLIDAY,
Associate General Counsel,
OWSLEY VOSE,
THOMAS C. MARSHALL,
Attorneys,
National Labor Relations Board.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sect. 151, *et seq.*) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or as-

sisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire

> record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

The relevant portion of the 1944 Appropriation Act (Act of July 12, 1943, 57 Stat. 494, 515) is as follows:

> * * * No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided,* That hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.

The relevant portion of the 1945 Appropriation Act (Act of June 28, 1944, 58 Stat. 547, 568) is as follows:

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, or

a renewal thereof, between management and labor which has been in existence for three months or longer without complaint being filed by an employee or employees of such plant: *Provided,* That, hereafter, notice of such agreement or a renewal thereof shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person: *Provided further,* That these limitations shall not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code.

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